

Date: June 23, 1997

Case No.: 96-SWD-2

In the Matter of

KEVIN L. ISHMAEL,
Complainant,

v.

CALIBUR SYSTEMS, INC.,

and

UNITED PETROLEUM CORP.,
Respondents,

DAVID S. CLARK, Esq.

and

BRUCE C. BRYANT, Esq.
For Complainant

NEAL S. MELNICK, Esq.

For Respondent

Before: FLETCHER E. CAMPBELL, JR.
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

This proceeding arises from a claim under the employee protection section of the Solid Waste Disposal Act (“the act”), 42 U.S.C. 6971. Complainant seeks back pay, reinstatement or front pay, compensatory damages, exemplary damages, and attorney’s fees and costs as a result of his termination from employment with Respondent.

A formal hearing was held in this case on November 7, 1996 in Knoxville, Tennessee. Complainant offered Exhibits CX-1 through CX-22.¹ Respondents, United Petroleum Corporation (hereinafter UPC) and Calibur Systems, Inc. (hereinafter Calibur), offered Exhibits RX-1 through RX-8. All were admitted into evidence. Complainant filed a post hearing brief, but Respondent failed to do so. The findings and conclusions which follow are based on a complete review of the entire record in light of the arguments of the parties, applicable statutory provisions, regulations, and pertinent precedent.

ISSUES

1. Whether UPC is an alter ego of Calibur and properly named as a Respondent.
2. Whether Complainant engaged in protected activity under the act which resulted in adverse employment action.
3. Whether Respondent had a legitimate, nondiscriminatory reason for terminating Complainant.
4. What remedy is Complainant entitled to?

FINDINGS OF FACT

The testimony of record can be summarized as follows:

A. Testimony of Kevin Ishmael, Complainant

Complainant began working for Respondent in June 1995 (Tr. 78). He became aware of the position while on vacation in Knoxville and discussed employment with the manager at that time (RX-3, 29). Complainant filled out an application and was offered a position as manager by David Giles, the acting area supervisor, under authority from Mike Thomas (RX-3, 29). He was transferred to the Oak Ridge facility in January 1996 as the general manager (Tr. 78). Complainant's duties as general manager included daily operations, management of all property, supervising employees, scheduling, banking, inventory, and stick readings² (Tr. 79; RX-3, 32). Daily readings were taken of the gasoline inventory and compared with daily sales and shipments (Tr. 79). These readings were recorded in the daily log and reported to Robbie Roberts at Respondent's office (Tr. 79). Daily reports were printed each day and sent to corporate headquarters via modem (Tr. 164-5).

¹The following abbreviations will be used as citations to the record:

CX - Complainant's Exhibits
RX - Respondent's Exhibits
TR - Transcript.

²Complainant indicated that the gasoline levels in the tanks were measured with a stick which was marked in inches to indicate the gallons in the tank. The stick was slowly inserted in the top of the tank, straight through the center hole and a measurement taken. If the measurement indicated a variance, the procedure would be repeated to verify the variance (RX-3, 34). Complainant also indicated that the tanks held 8,000 gallons (EX-3, 31).

Complainant was uncertain as to what the corporate office did with the reports once they were submitted (Tr. 165).

Complainant began to notice a shortage of approximately one hundred gallons in his daily log in the days immediately preceding February 21, 1996 (Tr. 80).³ He reported these variances to Ms. Roberts and to his supervisors, Dwight Thomas, Bill Ownby, and Ken Harrop (Tr. 80). Ms. Roberts indicated that she would report the variances to Dwight Thomas, who stated that he would “look into it” (Tr. 81). Complainant did not see the results of any such investigation (Tr. 81) but admitted that he did not know what the procedure was for cross-checking variance reports at the office (Tr. 166). Ownby stated that there was no problem (Tr. 81). Ken Harrop responded to the report by laughing it off and telling Complainant not to worry about it (Tr. 81). Complainant testified that he had lost “hundreds of gallons” over the course of his employment. When presented with a copy of the records from corporate headquarters, Complainant testified that the numbers reported there were smaller than those indicated by Complainant and that the document was dissimilar to the records kept at the Oak Ridge Facility (Tr. 141).

Complainant informed the assistant manager at the Oak Ridge facility, Mike Shannon, of the discrepancies (RX-3, 40). In response, Shannon reported to Complainant that a sink hole had developed on the property (Tr. 82). Shannon reported the sink hole to Respondent and Respondent filled it in without further investigation (Tr. 82). Complainant noted that, when one stepped on the area which was filled in, one could feel the ground sink (Tr. 82). Complainant also reported problems with water appearing in the gasoline tanks (Tr. 83). Except for these indications, Complainant saw no other surface evidence of a gasoline leak (Tr. 166).

Because Respondent exhibited no response to Complainant’s concerns regarding the variances and the sink hole, Complainant contacted Sgt. Mike Uher of the Oak Ridge Police Department (ORPD)⁴ to report a possible gasoline leak on February 21, 1996 (Tr. 84). Three firefighters from the Oak Ridge Fire Department (ORFD) came to the Oak Ridge Calibur Car Wash approximately half an hour to an hour later to investigate (Tr. 87; RX-3, 52). Complainant showed the firefighters the records which indicated that gasoline might be leaking (Tr. 87). Complainant was uncertain whether the firefighters could understand the records he was showing them (Tr. 88). The firefighters informed Complainant that they would contact someone else with more authority over possible fuel leaks (Tr. 88). The investigation by the ORFD lasted for approximately ten to twenty minutes (RX-3, 52).

Shortly after the visit from the ORFD, Complainant received a phone call from Phil Chambers of the Tennessee Department of Environment and Conservation (TDEC) (Tr. 88). Complainant asked if he could make a statement to Chambers off the record, but Chambers told him that anything he said would be a matter of public record (Tr. 89). Although Complainant was concerned that if he cooperated he would lose his job (Tr. 92), he informed Chambers that the facility had been losing

³In his deposition, Complainant indicated that he had noticed a discrepancy over thirty days (RX-3, 40).

⁴Complainant had worked with Sgt. Uher as an informant previously (RX-3, 45).

gasoline and gave him the phone number for Dwight Thomas (Tr. 89). Complainant confirmed the notation on Chambers' memo that the call had been made at 11:05 A.M. on February 21, 1996 (Tr. 91). Respondent directed Complainant to direct any calls from the Environmental Protection Agency (EPA)⁵ to the office and to inform any investigators that no records were kept at the site, but were all stored at the corporate headquarters (Tr. 92-93). Before speaking with Chambers and TDEC, Complainant had no fear of losing his job with Respondent (Tr. 92). Complainant had no reprimands for customer complaints and had an overall good relationship with his supervisors (Tr. 116).

Approximately fifteen to twenty minutes after he spoke with Chambers, Complainant received a call from Bill Ownby, operations manager for Calibur (Tr. 94). Ownby told Complainant to gather the records kept at the store and to come to the corporate office in Knoxville (Tr. 94). Complainant estimated that it took five to ten minutes to gather the records and a half hour to drive to the office (Tr. 95). When Complainant arrived at the office, a meeting took place between Ownby, Harrop and him (Tr. 95). Dwight Thomas joined them less than a minute later (Tr. 95). Ownby, Harrop and Dwight Thomas informed Complainant of the conversation in which Chambers had indicated Complainant's report of a possible gasoline leak (RX-3, 57).

After about 30 seconds, Mike Thomas⁶ joined the meeting briefly and stated, "If Kevin agreed to cooperate with TDEC, then he needs to be fired" (Tr. 95; RX-3, 56).⁷ Ownby followed up this statement by Mike Thomas by saying that, if Claimant had cooperated, he would be fired (RX-3, 57). After hearing this statement, they asked Complainant if he agreed to cooperate with TDEC (Tr. 95). Complainant, fearing for his job, denied any involvement with Chambers or TDEC (Tr. 95, 171). At this time Complainant was told that Chambers would be called back to verify his statement that Complainant had cooperated, and if so, Complainant would be terminated (Tr. 96). Chambers was at lunch and could not be reached. Complainant was told to go to lunch and that Respondent would page him if Respondent wanted him to return to the office (Tr. 97). The meeting adjourned at approximately noon (Tr. 97). Complainant waited to be paged at a park near the office until approximately 3:00 P.M. but went home when he received no page because that day was his weekly scheduled day off (Tr. 98; RX-3, 61, 69).

Complainant reported for work on February 22, 1996 at 7:30 A.M. to discover that Respondent had changed the locks at the facility (Tr. 99). The assistant manager at the Oak Ridge facility informed Complainant that he had been fired and needed to return to corporate headquarters

⁵Most of the witnesses in this case referred to TDEC as the EPA. In fact, TDEC is the state agency charged with monitoring and enforcing the regulations of the U.S. EPA. Any reference by any witness of calls made to or from the EPA in this case were in actuality to or from TDEC unless otherwise noted.

⁶Dwight Thomas and Mike Thomas are cousins (Tr. 281).

⁷This is consistent with the statement made by Complainant in his deposition on August 27, 1996. At that time Complainant testified that Mike Thomas stated, "If I find out, that it is true, that you offered to cooperate with them off the record, you will be fired" (RX-3, 57).

to turn in his keys and his pager (Tr. 99). Complainant had a pager issued by Respondent, and his supervisors had paged him several times in the past (Tr. 100). Complainant had given his business cards, which indicated his pager number, to his supervisors (Tr. 100, 162; CX-15).

When Complainant began working for Respondent, his salary was \$20,000 per year.⁸ He received a raise to \$25,000 within the first month (Tr. 103). Complainant estimated that his take-home pay while employed by Respondent was \$400-\$450 per week (Tr. 129). Health, dental and optical insurance became available to Complainant around December 1995 (Tr. 103). Mike Thomas agreed with Complainant that Respondent would pay for Complainant's insurance through his wife's employer because it was less expensive than providing insurance through Respondent's plan (Tr. 104). However, this promise was never honored (Tr. 104).

As of December 1, 1995, Complainant also became eligible for bonuses while employed with Respondent (Tr. 107). These bonuses were determined by cash volumes and number of vehicles which were serviced at the Oak Ridge facility (Tr. 107). Complainant received a memo from Dwight Thomas indicating that the bonus plan would be implemented on December 1, 1995 and that bonuses would be paid monthly based on volume increases and a combination of unit sales and total dollars (CX-20). Complainant testified that he received several small bonuses while at the Sevierville location (Tr. 105, 113).⁹ However, his employment records indicate that he received one bonus of \$300.00 on February 29, 1996 (CX-13).

Following his termination, Complainant applied for other positions in factories (Tr. 122). Complainant testified that he "went all over" in an attempt to find a position to support his family (Tr. 122). After about a month, Complainant began work as a finance manager at City Motors Auto Sales. His salary was \$300 per week plus a 25 percent commission on any cars he sold (Tr. 122). There were no health care or other benefits and no bonuses involved in this position (Tr. 122). Shortly before the hearing, Complainant's employer reorganized and transferred him to a sales position (Tr. 122). In this position he receives no regular salary but only the 25 percent commission and no health care or other benefits and no bonus payments (Tr. 122). Complainant's salary in this position varies greatly. In August 1996, Complainant earned \$740.00 (CX-17). In September and October 1996, Complainant earned approximately \$2,000.00 per month (CX-17). However, Complainant testified that these were the best months he had while employed at City Motors and that, as of the date of hearing on November 7, 1996, he had not yet sold a vehicle during November (Tr. 126).

⁸Complainant's employment records indicate that his starting salary was \$22,000 per year (CX-13). After looking at his employment records, Complainant admitted that he was unsure if his beginning salary was \$20,000 or \$22,000 (Tr. 110).

⁹Complainant testified that he received, "a couple hundred dollars on one day, \$300 on another time" (Tr. 113).

Complainant attended Michigan State University, taking classes in criminal justice and receiving an associate degree in that subject (RX-3, 7).¹⁰ He also attended the Drug Enforcement Agency (DEA) school in Kalamazoo, Michigan in 1978 or 1979 and worked with DEA until 1993 (RX-3, 10). During this time, Complainant's services were contracted out to various police departments around the country (RX-3, 10). In 1993, Complainant became a special investigator for the Michigan Attorney General but was prevented by law from revealing the details of his involvement (RX-3, 16).¹¹ Complainant testified at his deposition that he had never been convicted of any crime except speeding tickets (RX-3, 37-8).¹²

Complainant testified that UPC and Calibur occupied the same office space, in which they were not separated at all. The two entities shared a receptionist and were never differentiated to Complainant (Tr. 131). Complainant indicated that there is only one switchboard, and the phone is answered "United Petroleum Corporations" regardless of to whom the call is directed (Tr. 135). Complainant's understanding was that UPC owns the building in which the office is located, and it is leased to Calibur (Tr. 181). Complainant performed work for UPC in its warehouse on several occasions but was paid by Calibur (RX-3, 21).

Complainant stated that he was quite upset for approximately a month following his termination until he found another position (Tr. 121). He was concerned with his ability to meet his

¹⁰Respondent introduced RX-1 and RX-2 from the registrar of Michigan State University stating that there was no record of Complainant being admitted to, attending or receiving a degree from the university (RX-1; RX-2). Complainant objected at the hearing to the admission of RX-1, RX-2, RX-4, RX-5, and RX-6 because they were not produced subject to a request for documents nor listed on Respondent's Exhibit list. I address this issue, *infra*, page 17.

¹¹In response to a letter from Respondent's counsel (RX-4), Robert Ianni of the State of Michigan Department of Attorney General stated that Complainant did assist the office in an investigation in 1993-94. However, he was not an employee, nor did he have the title of special investigator. Complainant was not on the payroll of the Attorney General and was not involved in any active investigation (RX-5). Ianni went on to state that Complainant's assistance may have made him an agent of that office. Although Complainant received no payment for his services, Ianni notes that it would not be unusual for the state police to reimburse Complainant for any expenses including lost wages (RX-5).

Mark E. Blumer, First Assistant Attorney General of the Michigan Department of Attorney General indicated the his office had worked with Complainant on a "matter of sufficient significance and for a sufficient period of time to allow us to develop a firm opinion of his character" (CX-22). This comment was made in a letter written as a recommendation of Complainant for licensure with the Division of Emergency Medical Services in Lansing, Michigan (CX-22).

¹²Respondent offered RX-6 as rebuttal for this statement which indicates that Complainant was convicted of disorderly conduct on October 21, 1976, misdemeanor receiving and concealing stolen property worth less than \$100 on February 21, 1980, and misdemeanor larceny of \$100 or less on March 26, 1982 (RX-6). As stated *supra* note 10, Complainant objected to RX-6 on the grounds that this document was not revealed subject to a request for discovery or listed on the exhibit list. In addition, Complainant objected that the evidence is inadmissible under 29 C.F.R. §18.609 as evidence of past crimes. These issues are addressed, *infra*, page 17.

bill payments and support his family (Tr. 122). He never sought professional counseling for his emotional condition (Tr. 121).

B. Testimony of Laurie Ishmael

Laurie Ishmael has been married to Complainant for six years (Tr. 32). She testified that, since termination from his employment with Respondent, he has been more on edge and was “greatly bothered” by his discharge (Tr. 35). Ms. Ishmael indicated that the family had experienced some financial difficulties because Complainant’s present income fluctuates greatly, as he is solely on commission (Tr. 32). While employed for Respondent, Complainant had health insurance available to him, but his new job does not provide this benefit (Tr. 33).¹³

C. Testimony of Robbie Roberts

During the relevant period, Roberts was an accounting clerk for Respondent. She left Respondent’s employ because she was offered a better position (Tr. 40). Roberts’ duties while employed with Respondent included downloading daily reports of purchases and stick readings (Tr. 40). When Roberts received a report of a variance of more than 100 gallons from a store manager, she would report it to Dwight Thomas. She was unaware of what was done with the information after this action (Tr. 42).

The managers of Respondent’s twenty-one stores contacted Roberts on a daily basis to provide the daily reports to her (Tr. 41). Complainant indicated that he was concerned about variances between his daily stick readings and the amount of gasoline which should have been contained in the tanks (Tr. 41). Variances appeared regularly when the managers reported their daily values but were usually satisfactorily explained upon further examination (Tr. 42). Roberts indicated that there were more problems with variances at the Oak Ridge location than at the other stores (Tr. 42). Complainant had reported significant variances in the four to five days immediately before February 21, 1996 (Tr. 44).¹⁴ Roberts reported the variances, indicated by Complainant on and shortly before February 21, 1996, to Dwight Thomas (Tr. 51).

D. Deposition Testimony of Captain William Moehl

Capt. Moehl is a patrol captain with the Oak Ridge Police Department (ORPD) (CX-2, 4). A drug enforcement officer under Capt. Moehl’s authority, Sgt. Mike Uher, stated that he received a report of a gasoline leak at the Oak Ridge Calibur Car Wash (CX-2, 5, 8). Capt. Moehl performed

¹³Complainant did not take advantage of the offer of health care benefits while employed by Respondent because at the time he was able to get health care insurance through his wife’s employer at a lower rate (Tr. 38). Complainant testified that Mike Thomas had indicated that he would subsidize Complainant’s choice of his wife’s insurance but did not follow through with this promise. It is no longer possible for Complainant to get health insurance through his wife’s employer (Tr. 38).

¹⁴Roberts indicated that she could not remember the exact amount but guessed that it was between 300 and 500 gallons over the four to five days prior to February 21, 1996 (Tr. 45).

a cursory investigation by driving through the facility and noted no obvious indications of a leak (CX-2, 6). Pursuant to ORPD procedure, Capt. Moehl notified the ORFD and the state EPA¹⁵ of the alleged leak (CX-2, 5). No written report was created, but Capt. Moehl assumed that a report was created when the ORFD investigated (CX-2, 9).

E. Deposition Testimony of William Henry

Henry is a firefighter with the Oak Ridge Fire Department (ORFD) (CX-1, 4). He, along with another firefighter, responded to a call regarding a possible gasoline spill at the Oak Ridge Calibur Car Wash on February 21, 1996 (CX-1, 4, 6). Henry was unaware of who had made the initial report which led to his investigation (CX-1, 5). Henry did not recall the exact time of his investigation at the car wash but estimates that it was late morning or afternoon (CX-1, 5).

Henry investigated both outside and inside the Oak Ridge facility (CX-1, 6). Henry looked at the pads and the tanks and noted a pothole near the pumps (CX-1, 9). He talked to Complainant and Complainant showed him some records which Complainant indicated showed a leak of gasoline (CX-1, 8). Henry's investigation yielded no sign of a leaking underground storage tank (UST) (CX-1, 6). Henry did not complete a written report on his investigation (CX-1, 15).

F. Deposition Testimony of Captain Larry Lewis

Capt. Lewis is a fire captain with the ORFD (CX-5, 4). He performed a follow-up investigation after firefighter William Henry's investigation (CX-5, 5). This investigation was performed either the last thing before lunch or the first thing after lunch on February 21, 1996 (CX-5, 6). Capt. Lewis walked around the Calibur Car Wash facility and was shown the records which Complainant showed to Henry (CX-5, 7). When Capt. Lewis asked to speak with the manager, an employee at the facility indicated that Complainant no longer worked there (CX-5, 8). The employee further indicated that Complainant had fabricated the leak report to cause problems because he knew he was to be terminated (CX-5, 8). Capt. Lewis' investigation did not reveal any evidence of a gasoline leak (CX-5, 11).

G. Deposition Testimony of Phil Chambers

Chambers is employed in the Knoxville field office of TDEC, which enforces underground storage tank and other petroleum regulations involving the Water Quality Act and the Safe Water Act (CX-3, 4-5). On February 21, 1996, Chambers received a complaint from John West, who works for the Division of Water Pollution Control in the Knoxville Field office. West informed Chambers that he had received a call from Capt. Moehl at the ORPD regarding a release of gasoline the night before (CX-3, 6-7). To verify this complaint, Chambers contacted Capt. Moehl (CX-3, 7).

Following this call to Capt. Moehl, Chambers telephoned the Oak Ridge facility and asked to speak to the contact person of record, Jeff Huckabey (CX-3, 7-8). Chambers was informed that

¹⁵Capt. Moehl indicated that he contacted the state EPA (CX-2, 9). The official name of this organization is the Tennessee Department of Environment and Conservation (TDEC).

Huckabey no longer worked there and asked to speak to the person in charge of the facility (CX-3, 8). Complainant answered the call, and Chambers asked him if he was aware of any gasoline release which may have occurred the night before (CX-3, 8). Complainant responded that, because he “liked his job,” he could not say anything but requested to speak off the record (CX-3, 9). Chambers responded that all facts revealed to him were a matter of public record (CX-3, 9). Chambers requested Complainant’s supervisor’s name and Complainant gave him Dwight Thomas’ telephone number (CX-3). Complainant then disclosed that for over a month Calibur’s leak detection records indicated a significant loss of gasoline (CX-3, 9). Chambers then ended the conversation because he could see that Complainant was uncomfortable speaking to him (CX-3, 9). According to Chambers’ records, this conversation took place at 11:05 A.M. on February 21, 1996 (CX-3, 9, C).

Chambers then called the number given to him by Complainant (CX-3, 10). He was referred to Harrop and Ownby because Dwight Thomas was not in the office (CX-3, 10). Chambers asked Harrop and Ownby if they were aware of any problems at the Oak Ridge facility. They responded that they were not (CX-3, 10). Chambers then related the events of that morning to Harrop and Ownby including his conversation with Complainant (CX-3, 15, D). Harrop and Ownby informed Chambers that in the past they had worked with Wayne Clifford from the Knoxville office of TDEC and that they would call him after investigating the alleged loss of gasoline (CX-3, 15). According to Chambers’ records, this conversation occurred at 11:10 A.M. on February 21, 1996 (CX-3, D).

H. Deposition Testimony of Michael Thomas

Mike Thomas is the President of both UPC and Calibur (CX-4, 7-8). Calibur is a wholly owned subsidiary of UPC (CX-4, 5). Mike Thomas incorporated Calibur in Tennessee in January 1993, and UPC was incorporated in Delaware at approximately the same time. The two corporations were joined by a reverse merger in April 1993 (CX-4, 7). Mike Thomas is the president of both UPC and Calibur, and Dwight Thomas is the Secretary-Treasurer of both corporations (CX-4, 7-8). The officers of both corporations are Mike Thomas and Dwight Thomas (CX-4, 7). In addition, there are three other members of the UPC board of directors, and Douglas Keene¹⁶ is the Chief Financial Officer (CFO) (CX-4, 8). The business address for both corporations is the same (CX-4, 10). Calibur has paid Mike Thomas and Keene in their capacity working for both corporations, as UPC does not have its own payroll (CX-4, 15).¹⁷

Mike Thomas hired Complainant as a store manager (CX-4, 17-8). Complainant started working at the store on “North Broadway” but was transferred to the Sevierville location for a brief period and then to the Oak Ridge facility (CX-4, 18). Mike Thomas testified that Calibur kept accurate records and had “never lost any product” (CX-4, 19). He indicated that a couple hundred

¹⁶Mike Thomas refers to the CFO as Bill Keene (CX-4, 8). However, in Mr. Keene’s deposition he states that his name is Douglas Keene (CX-8), and in his testimony at the hearing he states that his name is Lee Douglas Keene (Tr. 327).

¹⁷Keene, the CFO, states that, in fact, he is paid by UPC but in the past has been contracted to UPC and paid by Calibur. This change occurred on the advice of the Internal Revenue Service (Tr. 328).

gallons' fluctuation was normal, but any more than that was to be brought to his attention or that of Dwight Thomas or Harrop (CX-4, 25). Calibur had planned to buy the property on which the Oak Ridge facility sat and update the system to comply with the EPA 1998 standards (CX-4, 20, 90). This was completed approximately a month after Complainant was terminated when Calibur obtained financing to perform the remodeling and upgrading (CX-4, 90). The gasoline tanks were upgraded and the lines replaced (CX-4, 26).

Mike Thomas testified that, if a store manager reported a shortage, Calibur "would go out immediately to check" on it (CX-4, 28). On February 21, 1996, Mike Thomas told someone to go out and investigate the alleged gasoline leak but could not say for sure whether such an inspection had occurred. If it did, Harrop conducted it (CX-4, 41-2).¹⁸ He also instructed that a careful review of the records be performed at the office (CX-4, 40). Mike Thomas stated that the managers have no records at the individual facilities except perhaps the records of the current day (CX-4, 100).

Before February 21, 1996 there were no plans to terminate Complainant regardless of any reprimands he had received in the past (CX-4, 35). Complainant had only one written reprimand in his file. Mike Thomas had several times reprimanded him orally while making visits to the Oak Ridge facility and had discussed with Complainant sexual harassment claims made against him (CX-4, 49, 56; CX-4, A). Other than the events which transpired after the report of the alleged gasoline leak, no events occurred on February 21, 1996 for which Complainant could have been terminated (CX-4, 36).

Mike Thomas requested that Complainant come to the office after the phone call from Chambers at TDEC (CX-4, 38).¹⁹ While Complainant was at the office, Mike Thomas told him, "If I find out that you reported--didn't follow procedure and didn't report to the company, and the company report--and the proper channels weren't followed, that you are fired" (CX-4, 60).²⁰ Complainant had not reported any leakage to Mike Thomas, and Mike Thomas was not informed if Complainant had reported any variances to any of his supervisors (CX-4, 82). Mike Thomas then left the meeting (CX-4, 61). He was later informed that Harrop, Ownby and Dwight Thomas assumed that Complainant had resigned when he failed to return from lunch (CX-4, 84). Mike Thomas was aware that Calibur sometimes issued pagers but was unaware if they had issued a pager to Complainant (CX-4, 31). He ordered that the locks on the Oak Ridge facility be changed sometime after the close of business on February 21, 1996 — after 5:00 P.M. (CX-4, 38).²¹ Mike Thomas

¹⁸Harrop testified at the hearing that he was in the office the entire day on February 21, 1996 and another individual would have ordered the investigation (Tr. 313; CX-6, 28).

¹⁹Harrop testified that he informed Mike Thomas that Ownby had called Complainant to the office (Tr. 309).

²⁰Later in his deposition, Mike Thomas stated that he had said, "If he was lying to me about the incident he would be fired" (CX-4, 81).

²¹In fact the changing of the locks was completed by 4:32 PM by Stan the Locksmith, as noted on the cash receipt for payment (CX-7, B).

stated that the locksmith was called by either Dwight Thomas, Harrop or Ownby (CX-4, 61). Mike Thomas did not inform any employees at the Oak Ridge facility that Complainant had been terminated (CX-4, 83).

I. Testimony of Billy Joe Ownby

At all relevant times, Ownby was the operations manager for Calibur (Tr. 233). He is currently on unpaid medical leave following back surgery (Tr. 232). While working for Calibur, Ownby oversaw the area managers, construction and maintenance (Tr. 233). Prior to being employed with Calibur, Ownby owned the Sevierville facility, which he sold to Calibur on June 26, 1995 (CX-9, 5).

Harrop contacted Ownby on February 21, 1996 regarding a phone call from Mr. Chambers of TDEC (Tr. 234). The call was put on speaker phone, and Chambers indicated that he had received a report from the ORFD of a gas spill at the Oak Ridge facility and had contacted Complainant regarding this report (Tr. 234). Chambers stated that Complainant had asked to remain anonymous and that Chambers had refused this request (Tr. 234). Following this phone call Ownby and Harrop undertook an investigation of the office records to determine if a leak had occurred and called Complainant, telling him to bring the records from the store to the corporate office (Tr. 235).²² Following the recheck of the office records, no gasoline leak was found (Tr. 237).²³ Ownby does not recall if Complainant reported any variances to him prior to February 21, 1996 (CX-9, 28).

Complainant arrived at the office approximately an hour after being phoned and was confronted by Ownby, Harrop and Dwight Thomas regarding his involvement with Chambers (Tr. 235). Ownby asked Complainant if he had wanted to remain anonymous and talk off the record about the alleged gasoline leak, and Complainant replied that he did not (Tr. 235). Ownby attempted to call Chambers to confirm their earlier conversation, but Chambers was out to lunch at the time (Tr. 236). Ownby was angry with Complainant for attempting to speak to Chambers off the record (Tr. 248). About this time Mike Thomas walked in on the meeting and said, "If Kevin had lied to us about the anonymously — . . . he should be fired" (Tr. 236).²⁴ Ownby told Complainant to go to lunch and return so Chambers could be contacted (Tr. 236). Ownby had seen Complainant with a pager, but, to the best of his knowledge, Calibur did not issue it (Tr. 236-7). Ownby did not know Complainant's pager number regardless of who supplied the pager (Tr. 236). This meeting lasted for

²²In his deposition, Ownby testified that it was approximately thirty to forty minutes after the call from Chambers before Complainant was called (CX-9, 20).

²³This was determined from a comparison of receipts and sales versus inventory, not a physical examination of the Oak Ridge facility (Tr. 237).

²⁴However, in his deposition, Ownby testified that, after being informed of the situation, Mike Thomas said, "If this is true then Kevin should be fired" (CX-9, 23).

approximately thirty to forty minutes. They sent Complainant to lunch at 12:00 or 12:30 P.M. (Tr. 254).²⁵

When Complainant did not return from lunch, Ownby assumed that he had quit (Tr. 244). Ownby wrote a report, signed by himself, Harrop, and Dwight Thomas, which detailed the events of February 21, 1996 and the fact that they assumed that Complainant had quit (CX-9, D). However, Ownby agrees that the fact that Complainant reported to work on February 22 was inconsistent with this conclusion (Tr. 267). Both Dwight Thomas and Ownby had the power to terminate Complainant (Tr. 264).

Ownby called TDEC later that afternoon - 1:30 or 2:00 P.M.²⁶ - and spoke to Wayne Clifford (Tr. 256). No one representing Respondent spoke to Chambers to verify the details of his conversation with Complainant (Tr. 256). Following this phone call Mike Thomas was informed that Complainant had not returned from lunch, and they assumed that he had resigned (CX-9, 24). Ownby testified that had Chambers been contacted there was probably nothing Complainant could have said that would have altered the decision to terminate him (Tr. 265). He went on to say that, even if Complainant had admitted to asking to speak off the record with Chambers, he probably would have been terminated (Tr. 267). The locks were changed at the Oak Ridge facility around 4:00 or 5:00 that evening (Tr. 238). Ownby was uncertain whether it was he or Dwight Thomas who ordered the locks changed (CX-9, 25).

Prior to this incident, Ownby had received several complaints about Complainant. Ownby had discussed previous customer complaints with Complainant (Tr. 240-1; CX-4, A). Ownby testified that receiving complaints from customers was not unusual, but complaints concerning Complainant concerned his attitude toward customers and the timeliness of his response to customer complaints (Tr. 242). Ownby also received two complaints of sexual harassment while Complainant was working at the Sevierville facility (Tr. 242; CX-4, A). Ownby attempted to confirm these complaints but was unable to do so (Tr. 242-3).²⁷ However, regardless of these previous complaints, Respondent had no plans to terminate Complainant prior to the events of February 21, 1996 (Tr. 251).

Ownby testified that RX-7 is a copy of one of the standard business cards used by Calibur. He indicated that he was unaware of any other card style used by Calibur (Tr. 238).

²⁵In his deposition, Ownby stated that Complainant did not arrive at the office until around 12:00 and was sent to lunch at 12:30 to 12:45 (CX-9, 21, 25).

²⁶In his deposition, Ownby testifies that he called TDEC at 2:00 or 3:00 PM (CX-9, 24).

²⁷Ownby testified at his deposition that the original complaint was made by a man at the Sevierville location stating that Complainant had made sexual advances toward two women at that location. The women were never contacted to verify this story (CX-9, 40).

J. Testimony of Dwight Thomas

At all relevant times Dwight Thomas was an area manager for Calibur but is currently the operations manager (Tr. 271; CX-7, 6-7).²⁸ He has been employed by Calibur for nineteen or twenty years (CX-7, 5). As an area manager, Dwight Thomas' duties included checking on paperwork and maintenance lists and overseeing the individual store managers (CX-7, 6). He also had the power to hire or fire store managers (CX-7, 11). Dwight Thomas also serves as the Secretary-Treasurer for both Calibur and UPC (Tr. 271-2).

Complainant was a car wash manager for Calibur at several of Calibur's locations - Broadway, Sevierville and, finally, Oak Ridge (Tr. 272). At some point in his employment, Complainant received a \$3,000 raise from a \$22,000 per year salary to \$25,000 per year (Tr. 286). On February 21, 1996, Dwight Thomas arrived at the corporate office at approximately 11:30 or 11:45 A.M. (Tr. 273). He walked into the meeting between Harrop, Ownby, and Complainant when they were attempting to call Chambers to verify the conversation with Complainant (Tr. 273). Chambers was not in the office (Tr. 273). Sometime during the meeting Mike Thomas walked in and said, "If Kevin's lying to us, he should be fired" (Tr. 276).²⁹ Dwight Thomas indicated that the meeting had been called for the purpose of determining why the ORFD and EPA had been called (CX-7, 17). Ownby told Complainant to go to lunch and return afterward (Tr. 273). No time was set for the meeting to reconvene (CX-7, 18). Complainant did not return after lunch and Dwight Thomas did not attempt to contact him (Tr. 274). To Dwight Thomas' knowledge, Complainant did not have a pager issued to him by Calibur (Tr. 275).

When Complainant did not return from lunch, they assumed that he had quit (Tr. 275). They decided that Complainant had quit sometime late afternoon on February 21, 1996 (CX-7, 36). Dwight Thomas was unaware if any effort was made to contact Chambers to verify the earlier conversation (CX-7, 39). At the hearing, Dwight Thomas testified that, if Complainant had come to him the next day, they might have worked something out (Tr. 288). However, in his deposition, Dwight Thomas indicated that, independent of whether or not Complainant had quit, he was not welcome to return to work (CX-7, 43).

He testified that he "thinks" that they called David Giles, one of the other managers, to contact Stan's Locksmith to change the locks at the Oak Ridge facility sometime in the late afternoon

²⁸Dwight Thomas took over this position when Ownby went on unpaid medical leave due to a back injury (CX-7, 8).

²⁹However, at his deposition, Dwight Thomas testified that Mike Thomas said, "If it's true that he — what he said about being anonymous talking to the EPA or something . . . he should be terminated or fired" (CX-7, 41).

(Tr. 275-6).³⁰ Dwight Thomas does not recall what time the locks were changed (Tr. 275). The employees at the Oak Ridge facility were informed that Complainant was no longer employed when the locks were changed (Tr. 293).

In response to the alleged gasoline leak, Dwight Thomas testified that no records were compiled on that day (Tr. 274). He did not instruct any employee to compile records but relied on Harrop to perform an investigation (Tr. 274).³¹ Although most records are kept at the office, the individual stores keep the EPA gasoline monitoring sheet (Tr. 277). The managers at other stores prepare this document. However, Complainant did not know how to do so, and it was prepared at the corporate office (Tr. 277). Although Complainant had contacted him in the past regarding stick reading variances, Dwight Thomas testified that Complainant had never mentioned possible leaks to him (Tr. 277).

Dwight Thomas had received customer complaints regarding Complainant (Tr. 278; CX-4, A). One such complaint involved Complainant's handling of a claim for damage to a vehicle sustained at the Oak Ridge facility (Tr. 278). In March 1996, after Complainant's termination, Dwight Thomas attempted to document earlier customer complaints and place the written reports in Complainant's employee file (Tr. 285; CX-7, 35). Regardless of any complaints, prior to February 21, 1996, Dwight Thomas had no plans to fire Complainant (Tr. 279). In addition, Dwight Thomas indicated that Calibur had never terminated a manager due to customer complaints (CX-7, 27).

K. Testimony of Kenneth Harrop

Harrop is in charge of expansion, development and acquisitions for Calibur and has worked for Calibur for thirteen to fourteen years (Tr. 296; CX-6, 5). His duties include designing, obtaining permits, contracts and bids, overseeing construction, supervising maintenance and handling the underground storage tanks (USTs) (Tr. 297-8). Harrop had business cards printed with the UPC name for occasions when he would represent UPC in acquisitions (Tr. 314; CX-21). Although Harrop had not represented UPC in any acquisitions prior to the hearing, he had distributed several of the cards indicating that he worked for UPC (Tr. 318). Harrop indicated that, if he did any work for UPC he would be paid by Calibur (Tr. 319). He has very little interaction with the individual store managers and saw Complainant less than once a week (Tr. 298, 301).

Harrop handled the plans for remodeling the Oak Ridge facility (Tr. 301). He testified that some of the renovation work was done by Calibur itself and that some was contracted to Fuel Tank Maintenance of Cookeville, Tennessee (CX-6, 6). He testified that, since 1993, Calibur had been planning the upgrade of the gasoline tanks to comply with EPA standards, which will take effect in 1998, but work was not started on this project at the Oak Ridge facility until March or April 1996

³⁰However, in his deposition, Dwight Thomas indicated that he did not know who decided that the locks should be changed and a locksmith called (CX-7, 38).

³¹However, shortly after this statement he testified that he had one of the "ladies in the office" gather the monthly summaries and review those documents (Tr. 276).

(Tr. 301, 303). When the tanks were relined, Harrop had an opportunity to carefully examine them and saw no evidence of gasoline leakage (Tr. 306).

On February 21, 1996, Chambers contacted Harrop regarding a report made by Complainant of a possible gasoline leak (Tr. 307). Chambers stated that Complainant had offered to speak to him off the record (Tr. 307). When Chambers told Complainant that any conversation was made a public record, he offered information that there had been a substantial loss of gasoline at the Oak Ridge facility (CX-6, 14). Harrop put Chambers on speaker phone and asked him to repeat their conversation for Ownby (Tr. 308; CX-6, 15). Prior to the call from Chambers, Harrop had no knowledge of a leak at the Oak Ridge facility (Tr. 307). Chambers informed Harrop that he was passing the investigation to Wayne Clifford, who had worked with the Oak Ridge facility previously (Tr. 308). Harrop indicated that he would call Clifford back after further investigation (Tr. 308). Following this phone call, Harrop researched the records at the corporate office for evidence of a gasoline loss (Tr. 310). While investigating the records for evidence of a leak, Harrop informed Mike Thomas of the report of an alleged gasoline leak (Tr. 309). Harrop did not go to the Oak Ridge facility to investigate the leak and did not send anyone to investigate (CX-6, 28). Harrop testified that someone else at the office “sen[t] someone out,” but he did not know who was sent or who at the office ordered the investigation of the site (CX-6, 28).

Harrop testified that Ownby called Complainant to the office and that Complainant was told to bring whatever records, “he might have there” with him (Tr. 310; CX-6, 31). When Complainant arrived, Harrop talked with him and noticed that the records which Complainant brought with him were not useful (Tr. 312). Harrop also indicated that the EPA worksheet, which was to be completed at the store was not done by Complainant (Tr. 311). When Ownby asked him about speaking to Chambers, Complainant denied any cooperation with TDEC (Tr. 312). Harrop then tried to contact Chambers and Clifford, but both were out to lunch at the time. Harrop indicated that he would call them back after lunch (Tr. 312). Harrop could not remember if Mike Thomas joined the meeting at any time on February 21, 1996 (Tr. 312).³² Complainant was told to go to lunch and return later so that the conversation with Chambers could be confirmed (Tr. 313). Harrop was unaware if Complainant had a pager or what his pager number was (CX-6, 36). Harrop was at the office for the remainder of the day, and Complainant did not return (Tr. 313). No one from Calibur later attempted to contact Chambers to confirm whether Complainant had attempted to report a leak anonymously (Tr. 321).

After completing an investigation of the records, Harrop called Clifford at TDEC and indicated that there was no evidence of a gasoline leak at the Oak Ridge facility (Tr. 313).³³

³²In his deposition, Harrop stated that after he, Ownby and Dwight Thomas tried to contact Chambers, that Mike Thomas “put his head in the door.” Harrop did not indicate what, if anything, Mike Thomas contributed to the meeting at that time (CX-6, 34).

³³Harrop testified at his deposition that an acceptable variance on a gasoline tank was 1% + 130 gallons per month (CX-6, 46). However, Chambers of TDEC indicated that there was no acceptable release of gasoline (CX-3,

Subsequently, TDEC performed an investigation of the Oak Ridge site and issued a notice of deficiency to Calibur (Tr. 315; CX-3, F).³⁴

L. Testimony of L. Douglas Keene³⁵

Keene is the Chief Financial Officer and executive vice president of UPC (Tr. 327-8). At all relevant times, Keene was a contracted CFO, allocating his time between UPC and its two subsidiaries (CX-8, 9). He indicated that, following a request from UPC's auditors, a separate UPC payroll was created (CX-8, 9). Keene received his paycheck from UPC and indicated that the only other employee of UPC was Mike Thomas (Tr. 329).³⁶ UPC, a Delaware corporation, has no operating activities but has two subsidiaries one of which is Calibur, a Tennessee corporation (Tr. 329, 331). Keene indicated that the leadership of the two corporations is as follows (Tr. 334-5):

	Calibur Systems	United Petroleum Corporation
Board of Directors	Dwight Thomas (Chairman) Mike Thomas	Mike Thomas (Chairman) Dwight Thomas James Fitzgerald Teddy Phillips Jamie Rose ³⁷
Officers	Mike Thomas (President) Dwight Thomas (Secretary-Treasurer)	Mike Thomas (President) Dwight Thomas (Secretary-Treasurer) L. Douglas Keene (CFO)

Calibur leases the office space shared with UPC from Mike Thomas. UPC subleases the space from Calibur (Tr. 335). There is no sublease agreement and no lease payments made between the two entities (Tr. 337). There is no physical separation between the offices of Calibur and UPC (Tr. 337).

17).

³⁴The notice of deficiency, issued on March 27, 1996, indicated that the method of release detection used by the Oak Ridge facility was inadequate and that a new method must be implemented. The notice reflected that TDEC was aware that renovations were underway at the Oak Ridge facility which might correct the deficiency (CX-3, F).

³⁵See *supra* note 16.

³⁶At his deposition, Keene indicated that Don Patton, who is head of Jackson United Petroleum, a subsidiary of UPC, was also on the UPC payroll (CX-8, 9).

³⁷James Fitzgerald is a banker with Credit Land Bank in New York. Teddy Phillips is with Phillips and Jordan, a local company in Knoxville. Jamie Rose is an attorney with Brown, Todd & Hayburn in Lexington, Kentucky (Tr. 335; CX-4, 9).

Calibur is a wholly owned subsidiary of UPC, and Mike Thomas is the single largest stockholder of UPC (Tr. 340).

Keene was not present for any of the relevant events which occurred on February 21, 1996 (CX-8, 6).

DISCUSSION

A. Evidentiary Issues

Complainant objects to the admission of RX 1-2 and 4-6. Complainant's first request for production of documents to Respondent Calibur dated August 2, 1996, 5 states, "Please produce copies of any documents upon which you will rely upon as evidence in the defense of this matter." Respondent did not produce RX 1-2 and 4-6. They did not list these documents on Respondent's Exhibit list prepared on August 26, 1996 as required by my Pre-Trial Order 1 dated August 6, 1996. However, pursuant to my order involving documentary evidence (Tr. 6), all evidence is admitted subject to a post-hearing motion to strike. Complainant did not file a motion to strike these documents, and they are, therefore, admitted into evidence. Although they are part of the record, I accord these documents little weight for the following reasons: 1) Respondent did not produce them pursuant to a specific discovery request; 2) the convictions indicated in RX-6 are more than 10 years old³⁸; and 3) Complainant's three convictions were for misdemeanors.³⁹

B. United Petroleum Corporation as Respondent

At the hearing Respondent indicated an intention to object to the inclusion of UPC as a party in this case, as UPC and Calibur are separate corporate entities. Although Respondent did not file a brief on this (or any other) issue, I consider it here.

Whether a corporation is responsible for the financial obligations and unlawful actions of another corporation is a question of federal law when it arises in the context of a federal employment dispute. Although state law provides guidance in fashioning the content of federal law, it is not

³⁸Regulation 29 C.F.R. 18.609 states:

(a) General rule. For the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a crime shall be admitted if the crime was punishable by death or imprisonment in excess of one year under the law under which the witness was convicted, or involved dishonesty or false statement, regardless of the punishment.

(b) Time Limit. Evidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for the conviction, whichever is the later date.

The U.S. Court of Appeals for the Sixth Circuit has found that evidence of crimes committed more than ten years hence should rarely be admitted even under a balancing test. U.S. v. Sims, 588 F.2d 1145, 1147 (6th Cir. 1978). The probative value of this information is minimal and does not in any way outweigh the prejudicial effect.

³⁹See, *supra*, note 12. Generally, only evidence of previous felonies is admissible for the purpose of attacking the credibility of a witness.

binding and, thus, does not control the outcome of this case. NLRB v. Fullerton Transfer & Storage Ltd., Inc., 910 F.2d 331, 335 (6th Cir. 1990). Federal law recognizes the limitation of liability that the adoption of a corporate form creates. Id. Absent special circumstances, a parent corporation is not responsible for a subsidiary's violations of law. Contractors, Laborers, Teamsters and Engineers Health and Welfare Plan v. Hroch, 757 F.2d 184, 190 (8th Cir. 1985); Hassell v. Harmon Foods, Inc., 484 F.2d 199 (6th Cir. 1972); Fullerton Transfer, *supra*, 910 F.2d 331.

Several courts have articulated formulations to determine when a parent-subsidary relationship is not a "normal one" in assessing whether the two will be considered as a single employer. Varnadore v. Oak Ridge Nat'l Lab., 92-CAA-2 & 5, 93-CAA-1, 94-CAA-2 & 3 (ARB June 14, 1996); Armbruster v. Quinn, 711 F.2d 1332 (6th Cir. 1983); Fullerton Transfer, *supra*, 910 F.2d 331. In Varnadore, the Administrative Review Board (ARB) affirmed the decision of the Administrative Law Judge (ALJ) that the parent company in that case, which was "merely a parent" and was not alleged to have employed the Complainant, should be dismissed as a respondent. Varnadore (ARB June 14, 1996); Varnadore III, 95-ERA-1 (ALJ Sept. 20, 1995). Neither the ALJ nor the ARB indicated any test that would determine when a parent company was not "merely a parent" and was to be considered as one with the subsidiary. I must consider whether UPC and Calibur are in fact separate entities operating separately or whether they are so interconnected that they must be considered one. Baker v. Stuart Broadcasting Co., 560 F.2d 389, 391 (8th Cir. 1977). The United States Court of Appeals for the Sixth Circuit has considered this question in the arena of discrimination cases under Title VII. That court stated:

The most important requirement is that there be sufficient indicia of an interrelationship between the immediate corporate employer and the affiliated corporation to justify the belief on the part of an aggrieved employee that the affiliated corporation is jointly responsible for the acts of the immediate employer. When such a degree of interrelatedness is present, we consider the departure from the "normal" separate existence between entities an adequate reason to view the subsidiary's conduct as that of both. . . . For guidance in testing the degree of interrelationship, we look to the four-part test formulated by the NLRB and approved by the [U.S.] Supreme Court . . . which assesses the degree of (1) interrelated operations, (2) common management, (3) centralized control of labor relations, and (4) common ownership. . . .

The showing required to warrant a finding of single-employer status has been described as "highly integrated with respect to ownership and operations. The test may also be satisfied by a showing that there is an amount of "participation [that] is sufficient and necessary to the total employment process," even absent "total control or ultimate authority over hiring decisions."

Armbruster, 711 F.2d at 1337.

Showing all four criteria is not necessary, but the judge must strike a balance among the criteria. Fullerton Transfer, 910 F.2d at 336; Baker, 560 F.2d at 392.

First, I consider the level of interrelated operations of UPC and Calibur. Calibur and UPC operate out of the same corporate office, which is not segregated in any way between the two corporations (Tr. 131, 337). The two entities share a telephone number and a receptionist (Tr. 135). The phone is answered with "United Petroleum Corporation," regardless of which entity is being called (Tr. 135). Harrop, who directs expansion and development for Calibur, is prepared to do similar work for UPC without a change in status or payroll (Tr. 314; CX-21). Complainant indicated that he did some work for UPC in a warehouse while on the Calibur payroll (Tr. 131). Most telling about the interrelationship between the two corporations is the apparent inability of the directors, officers and management to indicate consistently who worked for which corporation and what the relationship between the two entities was (CX-4, 7-10; Tr. 271-2). Only Keene seemed able to say with any certainty how the two entities were related and how they interconnected (Tr. 334-5). The management, in the persons of Mike Thomas, Dwight Thomas, Harrop and Ownby, had varying understandings of who the directors and officers of each corporation were and what their duties within the entities were.

Second, the level of common management must be considered. Both corporations have the same officers (Mike and Dwight Thomas). For at least some period in the past, the officers of UPC were paid from the Calibur payroll (CX-4, 14; Tr. 328; CX-8, 9). Keene, the CFO of UPC, also handles the financial management of Calibur (CX-8). Calibur leases the office space and subleases to UPC (Tr. 335). However, there is no written sublease agreement, and UPC makes no rental payments to Calibur (Tr. 337). UPC has no operations *per se*, and Calibur has levels of management set up to control the 19-20 individual stores.

Third, I consider the level of centralized control of labor relations. Again, employees working for UPC are sometimes paid from the Calibur payroll (Tr. 131). Harrop is prepared to perform work in an identical position for both corporations and distributes business cards indicating his representation of UPC, although he is solely an employee of Calibur (Tr. 314, 318).

Finally, I consider the level of common ownership of the two entities. Calibur is a wholly owned subsidiary of UPC. UPC is a publicly traded corporation with more than 1000 shareholders. Mike Thomas incorporated Calibur and acquired UPC through a reverse merger. Mike Thomas is, by far, the largest shareholder of UPC, owning somewhere between 33 and 47 percent of the outstanding shares (Tr. 340).

After reviewing these factors, I find that UPC and Calibur are separate entities on paper only. I find the UPC is an alter ego of Calibur and there is no meaningful distinction between the two corporations. The testimony in this matter is unequivocal on this issue. Although the two entities are incorporated in separate states, they act as one, and I will treat as such in this proceeding.

C. Complainant's *Prima Facie* Case

Complainant has the initial burden of producing evidence sufficient to make a *prima facie* showing of a violation of the employee protection section of the act. 42 U.S.C. 6971.

Under the burdens of proof and production in “whistle blower” proceedings, Complainant must first make a *prima facie* showing that protected activity was the likely motivation for Respondent’s decision to take adverse employment action. Respondent may rebut this showing by producing evidence that the adverse action was motivated by a legitimate, nondiscriminatory reason. Complainant must then establish that the reason proffered by Respondent is not the true reason. Complainant may persuade directly by showing that the unlawful reason more likely motivated Respondent, or indirectly by showing the Respondent’s proffered explanation is unworthy of credence. [citation omitted]

Complainant [must present] sufficient evidence to establish the requisite elements of a *prima facie* case: (1) Complainant engaged in protected activity; (2) Respondent took adverse action against Complainant; (3) Respondent was aware of the protected activity at the time of the adverse action; and (4) an inference that the protected activity was the likely motivation for the adverse action. . . . Moreover, the alleged violations need not be proven in order to be protected.

Conaway v. Instant Oil Change, Inc., 91-SWD-4 at 2, (Sec’y Jan. 5, 1993)

Complainant has proven that he engaged in protected activity. Complainant reported an alleged gasoline leak at the Oak Ridge facility first to the ORPD and later to TDEC (Tr. 84, 88). Although concerned for his job security, Complainant made a statement to Chambers indicating that the Oak Ridge facility had been losing gasoline for over a month and informed Chambers of the name of his supervisor to contact for further information (Tr. 89-91; CX-3, 9). Under the act, an employee is protected if he/she files, institutes or causes to be filed or instituted any proceeding under the act. 42 U.S.C. 6971 (a).

Complainant need not be correct in his assertion that a substantive violation of the act was occurring at the Oak Ridge facility but must merely have a reasonable belief that a violation was occurring. Conaway, 91-SWD-4 at 2. Complainant had seen evidence in his records of the loss of gasoline over a month’s time. This could lead to a reasonable belief that a gasoline leak was present. In addition, TDEC issued a notice of deficiency to Calibur following an investigation of the property. That this notice of deficiency was not for a gasoline leak but for inadequate release detection methods does not change the fact that a violation of the law was noted as a result of Mr. Ishmael’s complaint (CX-3, F). Complainant’s actions clearly fall under the protection of the act.

Complainant has proven that Respondent took adverse action against him in that Respondent terminated Complainant’s employment (Tr. 99). Respondent argues that Complainant was not in fact fired but resigned. The facts do not bear out this conclusion. It is entirely inconsistent for an individual to resign and then return for work the next morning. When the meeting on February 21, 1996 was adjourned for lunch, no time was given for Complainant to return (CX-7, 18). It is also inconsistent for an individual who earlier that very day was so concerned for keeping a job which he enjoyed that he would not speak to a representative from TDEC then to simply not return from lunch if he had been told to do so. I credit Complainant’s testimony that he was to wait to be paged to

return to the corporate offices (Tr. 97). Complainant testified that he had personally given each of these individuals his business card that indicated his pager number and that all four individuals had paged him in the past (Tr. 100, 162; CX-15). Complainant testified that, on the morning of February 22, 1996, he was asked to turn in not only his keys but his pager (Tr. 99). Had the pager been Complainant's private property, there would have been no reason for Complainant to turn it in to Respondent. Complainant's testimony is internally consistent, something that cannot be said for that of the others. Claimant's supervisors may not have known Claimant's pager number by memory, but they certainly had access to the information and could have contacted him.

Even if Complainant had been told to return to the office after lunch, Complainant has still carried his burden of showing that Respondent took adverse action against him. Dwight Thomas indicated that Complainant was given no specific time to return. February 21, 1996 was Complainant's scheduled day off (Tr. 98; RX-3, 61, 69). He was not required to return to work until the next morning. By shortly after lunch on February 21, 1996, Capt. Lewis of the ORFD was informed that Complainant was no longer employed at Calibur (CX-5, 8). Respondent did not attempt to contact Complainant later that afternoon either at home or at work. No one representing Respondent ever attempted to verify the conversation with Chambers to determine if in fact Complainant had been untruthful or if there was a misunderstanding. Someone decided that the locks were to be changed, and a locksmith in Knoxville (thirty minutes from the Oak Ridge store) was contacted and had completed work on the locks at the Oak Ridge facility by 4:30 P.M. (CX-7, B). These are not the actions of an employer attempting to clarify a situation but of one looking for a reason to terminate an employee. I find that Respondent took adverse action against Complainant by terminating him.

Complainant has proven that Respondent was aware of his protected activity at the time of his termination. Chambers contacted Harrop and Ownby and informed them that Complainant had cooperated in his investigation at 11:10 A.M. on February 21, 1996. Complainant did not arrive at the office until approximately noon.⁴⁰ By this time, Harrop had informed Mike Thomas that Complainant had reported a leak at the Oak Ridge facility to TDEC (Tr. 309). Harrop and Ownby were already aware of the protected activity per their conversation with Chambers. Although Chambers indicated that Complainant's initial response was to request anonymity, when he denied this request, Complainant nevertheless told Chambers of his belief that there was a gas leak at the Oak Ridge facility (CX-3, 15). Thus, Complainant's supervisors were clearly aware of his protected

⁴⁰The testimony on this fact is hazy at best. Complainant testified that Ownby called him approximately fifteen to twenty minutes after Chambers did, and it took Complainant thirty five to forty five minutes to gather the records at the Oak Ridge location and drive to corporate headquarters (Tr. 94). This account would have Complainant arriving between 11:55 A.M. and 12:05 P.M. Ownby testified alternatively at Complainant arrived either around noon or around 12:10 P.M. (Tr. 235; CX-9, 21) but also states that Complainant was not even asked to come to the office until 11:40 or 11:50 A.M. (CX-9, 20) and may have been sent to lunch after the meeting as early as noon (CX-9, 25). Dwight Thomas testified that he arrived at the office at 11:30-11:45 and went directly to the meeting with Ownby, Harrop and Complainant (Tr. 273). Although, this particular discrepancy is relatively minor, it mirrors a larger problem with the testimony of Respondent's witnesses.

activity prior to his termination. In addition, Mike Thomas, Ownby and Dwight Thomas testified that, prior to the events of February 21, 1996, there were no plans to terminate Complainant (CX-4, 35; Tr. 251; Tr. 279).

For the above-stated reasons, Complainant has made a *prima facie* showing that protected activity was the likely motivation for Respondent's decision to terminate him.

D. Respondent's Rebuttal

Respondent may rebut this showing by producing evidence that the adverse action was motivated by a legitimate nondiscriminatory reason. Conaway, 91 SWD-4 at 2. Respondent argues that it did not terminate Complainant for cooperating with TDEC but for lying about cooperating with TDEC.⁴¹ To prevail, Complainant must establish that the reason proffered by Respondent is not the true reason for his termination.

Respondent seems particularly efficient at passing blame among its supervisors. Ownby, Harrop, Dwight Thomas, and Mike Thomas all testified that it was someone else's responsibility to investigate the alleged leak by going to the Oak Ridge facility (Tr. 237; Tr. 274; CX-6, 28; CX-4, 41-2). Ownby and Dwight Thomas pass blame to each other as to who ordered the locks changed (CX-9, 25; Tr. 275-6; CX-7, 38). Finally, none of them seems able to agree to what Mike Thomas said when he came into the meeting with Complainant on February 21, 1996. As shown below and at note 42, not only do they disagree with each other about the events of that day, but Dwight Thomas, Mike Thomas and Ownby manage to contradict themselves on several occasions. I find that their testimony is questionable at best.

If the events occurred as Respondent argues, Mike Thomas entered the office where Dwight Thomas, Harrop, Ownby and Ishmael were already gathered and stated that, if Complainant had lied about speaking to TDEC, he should be fired. However, according to Respondent's witnesses, the facts leading up to this statement make this version of the events impossible: Mike Thomas had been informed of the situation prior to Complainant's arriving at the office in Knoxville and was not involved in the conversation up to that point (Tr. 309; CX-4, 60-1). Harrop spoke to Mike Thomas prior to Complainant coming to the office to inform him of the alleged gasoline leak (Tr. 309). Mike Thomas was not present for any of the meetings prior to walking into Ownby's office and would have had no way of knowing whether Complainant was lying about compliance with TDEC or not (CX-4, 60-1). If Mike Thomas thought that Complainant should be fired, his only basis of knowledge at that

⁴¹Respondent points to previous problems recorded in Complainant's employment file. The customer complaints and the unsubstantiated complaint of sexual harassment are irrelevant here. Ownby, Dwight Thomas and Mike Thomas agree that regardless of his employee record, there were no plans to terminate Complainant prior to February 21, 1996 (CX-9, 16; Tr. 251; Tr. 279; CX-4, 35). In addition, Dwight Thomas indicated that Calibur had never terminated a manager due to customer complaints (CX-7, 27). The fact that Dwight Thomas attempted to bolster these complaints with written records after Complainant was terminated is a further act of discrimination (Tr. 285; CX-7, 35). In any case, I find that these prior complaints played no role in Complainant's termination from employment.

time was that Complainant had cooperated with TDEC. He had no way of knowing that Complainant was untruthful about his cooperation with TDEC. Witnesses for Respondent contradicted themselves and each other about what Mike Thomas said when he entered the office.⁴² Under Complainant's more credible testimony (Tr. 95), Complainant had not yet answered the accusation by Dwight Thomas, Ownby and Harrop regarding whether he had cooperated with TDEC when Mike Thomas entered the meeting.

After being informed by Mike Thomas that, if he had cooperated with TDEC, he would be fired, Complainant lied to his supervisors about his cooperation (Tr. 95). Complainant does not deny that he lied about this fact but indicates that he feared for his job if he told the truth (Tr. 95, 171). Respondent then fired Complainant allegedly for lying to his supervisors. Respondent had given Complainant no choice but to lie, and, had he told the truth, Respondent's President had said that Complainant would be fired anyway (Tr. 95). Respondent attempts to take the high road here, arguing that it terminated Complainant because of his dishonesty, when, in fact, Respondent encouraged Complainant to be dishonest. Complainant had been informed that, if the EPA or TDEC contacted him regarding records of fuel use, he was to inform these organizations that such records were not kept at the site and were only available at the corporate offices (Tr. 93).⁴³ This was not true. After instructing Complainant to lie to TDEC, Respondent would like me to believe that it fired Mr. Ishmael for himself lying. The hypocrisy of this contention is glaring.

⁴²Mike Thomas testified by deposition and was unavailable for testimony at the hearing. At one point in his deposition, he indicated that he said, "If I find out that you reported--didn't follow procedure and didn't report to the company, and the company report--and the proper channels weren't followed, that you are fired" (CX-4, 60). This is the only mention of a failure to follow procedure as the reason for Complainant's termination. Shortly thereafter, Mike Thomas changed his story and said that he had stated, "If he was lying to me about the incident he would be fired" (CX-4, 81).

Billy Joe Ownby indicated at the hearing that Mike Thomas said, "If Kevin had lied to us about the anonymously -- . . . he should be fired" (Tr. 236). But at his deposition, held only two weeks prior to the hearing, Ownby made no mention that Complainant's veracity had anything to do with his termination but testified that Mike Thomas said merely, "If this is true then Kevin should be fired" (CX-9, 23).

Dwight Thomas testified at the hearing that Mike Thomas stated, "If Kevin's lying to us, he should be fired" (Tr. 276). However, again, at his deposition, two weeks prior to the hearing, Dwight Thomas testified that Mike Thomas said, "If it's true that he — what he said about being anonymous talking to the EPA or something . . . he should be terminated or fired" (CX-7, 41). At his deposition, Dwight Thomas made no statement that Claimant's veracity was an issue in his termination.

Ken Harrop, although present for the meeting on February 21, 1996, could not even remember when or if Mike Thomas joined the meeting (Tr. 312; CX-6, 34).

These examples do not exhaust a possible list of testimonial inconsistencies by Respondent's witnesses.

⁴³Respondent argues that no reports were kept at the individual stores; so any information Complainant could have shown TDEC or the ORFD would have been incomplete. However, immediately after Ownby and Harrop received the call from Chambers, they called Complainant and requested that he bring all the records *from the store* to the corporate office (Tr. 235).

In addition, Dwight Thomas changed his recollection of what Mike Thomas said. In his deposition, Dwight Thomas indicated that Mike Thomas had said that, if Complainant had complied with TDEC, he should be fired (CX-7, 41). It was not until the hearing that Dwight Thomas “remembered” that Mike Thomas had stated that Complainant should be fired if he lied about attempting to participate in an investigation off the record. Indeed, Mike Thomas testified to two different versions of the statement in the same deposition (CX-4 at 60, 81).

I find that Respondent’s stated reason for terminating Complainant is pretextual in the extreme. The facts do not bear out Respondent’s contention that Complainant was terminated for lying to his supervisors. Respondent’s own witnesses do not provide consistent testimony on which to base a finding that Respondent had any reason for terminating him other than Complainant’s contact with TDEC.

E. Damages

The act states that damages may require “the party committing such violation to take such affirmative action to abate the violation . . . , including, but not limited to, the rehiring or reinstatement of the employee to his former position with compensation. 42 U.S.C. 6971(b). The act also permits the awarding of costs and expenses that were reasonably incurred by the complainant in pursuing his claim. 42 U.S.C. 6971(c).

Courts have generally held that one who prevails in a discrimination action is presumptively entitled to back pay from the date of the discriminatory action until the date judgment is entered. Shore v. Federal Express Corp., 777 F.2d 1155, 1159 (Shore I) (6th Cir. 1985). Complainant’s salary at the time of his termination was \$25,000 per year or \$2,083 per month plus bonuses and optional health, dental, and optical insurance. Complainant estimates that the health care insurance is worth \$250.00 per month (Complainant’s brief at 27). Respondent does not contest this calculation. Complainant remained unemployed for approximately one month following his termination by Respondent. Complainant’s new position does not offer a guaranteed salary but is instead based on commission. His average monthly wage for the three months prior to hearing was \$1599. Complainant is entitled to the difference between his wages while employed with Respondent and his current average wage as well as the value of the health insurance available through Respondent.⁴⁴ The bonuses offered to Complainant under Respondent’s program are too speculative to be part of a back pay award.

⁴⁴ Claimant’s wages and health care for the month in which he was unemployed	\$2,333.00
Monthly difference between average wages at City Motor and wages and benefits at Calibur (April 1996 through June 1997)	\$734.00
Total loss March 1996	\$2,333.00
Total loss for April 1996 through June 1997	\$11,010.00
Total Back Pay due	\$13,343.00

Front pay in lieu of reinstatement may be appropriate if circumstances render reinstatement impossible or inappropriate. Doyle v. Hydro Nuclear Services, 89-ERA-22 (ARB Sept. 6, 1996). The Secretary and the Board have opposed attempts to grant front pay except in a case where reinstatement was impossible because of changes to the employer's workplace rather than because it would be merely inconvenient or uncomfortable. Id. The mere fact that the employee was fired does not establish the impossibility of a normal working relationship between the parties. Furthermore, in Creekmore v. ABB Power Systems Energy Services, Inc., the Deputy Secretary found that "observed tension between the parties at the hearing is not sufficient to demonstrate the impossibility of a productive and amicable working relationship." 93-ERA-24 (Dep. Sec'y. Feb. 14, 1996). There is no evidence in this case that reinstatement would be impossible. It appears that Respondent remains in the same business as before and continues to maintain car washes at various locations in the Knoxville area. I find that reinstatement is the proper remedy here.

Complainant requests that I award compensatory damages in this case. Regulation 29 C.F.R. 24.6(b)(2) states, in part, "The Secretary may, where deemed appropriate, order the party charged to provide compensatory damages to the complainant." Compensatory damages may be awarded to compensate Complainant for emotional pain and suffering, mental anguish, embarrassment, humiliation, and cost of searching for a new job. Complainant need not present medical or psychological evidence to prevail. Busche v. Burkee, 649 F.2d 509, 519 n.12 (7th Cir.), *cert. denied*, 454 U.S. 897 (1981); Creekmore, 93-ERA-24. Compensatory damages also include the cost of searching for a new job. Id.

Complainant does not present any medical or psychological evidence in this case but offers his testimony and that of his wife to show the mental anguish and emotional pain and suffering that he endured following his termination. Laurie Ishmael testified that Complainant was more on edge after being terminated from his job with Respondent. She also indicated that Complainant's family endured significant financial strain due to Complainant's fluctuating income in his new position (Tr. 32). Complainant remained unemployed for a month prior to finding a new position. He testified that he was quite upset during this time and was concerned about his ability to support his family (Tr. 122). I conclude that the evidence warrants an award of \$5,000 in compensatory damages. I base this conclusion on a comparison of awards of compensatory damages in other whistleblower cases before the Secretary of Labor. Thomas v. Arizona Public Service Co., 89-ERA-19 at 14 (Sec'y Sept. 17, 1993) (The complainant was awarded \$1,000 for humiliation suffered because of decertification); Lederhaus v. Paschen & Midwest Inspection Service, Ltd., 91-ERA-13 at 7 (Sec'y Oct. 26, 1992) (The complainant was awarded \$10,000. Evidence was offered that the complainant was unable to find a new job for five and a half months and was harassed by bill collectors during this time. The complainant was described by a neighbor as being uncharacteristically depressed, angry, rude and short-tempered. His family life also suffered, and he argued often with his wife); McCuiston v. Tennessee Valley Authority, 89-ERA-6 at 12-13 (Sec'y Nov. 13, 1991) (The complainant was awarded \$10,000 after losing his job and life, health and dental insurance. McCuiston also suffered from exacerbated hypertension and stomach problems); Johnson v. Old Dominion Security, 86-CAA-3 at 15-16 (Sec'y May 21, 1991) (All three complainants were awarded \$2,500 each because of

prolonged exposure to chemicals leading to health problems while employed with the respondent. The complainants also suffered anxiety and economic uncertainty following termination). The facts of the instant case are not as severe as those in Lederhaus or McCuiston, but Complainant did lose his job and health insurance. Complainant and his wife testified that they experienced economic hardship due to the unstable nature of Complainant's salary in his new position. Some psychological distress evidently occurred also.

Complainant also requests exemplary damages, but punitive or exemplary damages are not allowable absent express statutory authority. Smith v. Esicorp, 93-ERA-16 (Sec'y Mar. 13, 1996). Because the act does not authorize such damages, I am precluded from recommending such an award here.

RECOMMENDED ORDER

It is hereby ORDERED that:

1. Respondent shall reinstate Complainant to his former position with all benefits.
2. Respondent shall pay Complainant back pay in the amount of \$13,343.00 plus interest.⁴⁵
3. Respondent shall pay Complainant compensatory damages in the amount of \$5,000.
4. Respondent shall pay Complainant any attorney's fees and costs associated with the pursuit of this claim. Counsel for Complainant shall submit a fully-supported petition for fees and costs.

FLETCHER E. CAMPBELL, JR.
Administrative Law Judge

FEC/pak
Newport News, Virginia

⁴⁵Interest is to be calculated pursuant to 28 U.S.C. 1961 and shall equal, "the coupon issue yield equivalent . . . of the average accepted auction price for the last auction of 52 week United States Treasury Bill settled immediately prior to the date of judgment."

NOTICE: This recommended decision and order and the administrative file in this matter will be forwarded for final decision to the Administrative Review Board, United States Department of Labor, Room S-4309, Frances Perkins Building, 200 Constitution Avenue, NW, Washington, DC 20210. See 61 Fed. Reg 19978 and 19982 (1996).